

DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ANDREE LAYTON ROAF, Judge

CA05-1160

September 13, 2006

MARVIN DEWAYNE WITCHER
APPELLANT

v.

APPEAL FROM BENTON COUNTY
CIRCUIT COURT
[NO. DR 2004-1667-5]

HONORABLE XOLLIE DUNCAN,
JUDGE

MICHELLE KATHERIN WITCHER
APPELLEE

AFFIRMED IN PART; REVERSED IN
PART; AND REVERSED AND
REMANDED IN PART

This is a divorce case. The appeal is from the trial court's order denying both parties' request for a divorce, ordering each party to share physical custody of their child, and ordering Appellant Marvin Dewayne Witcher ("Dewayne") to pay \$96 per week in child support. The order did not grant either party primary custody of the minor child. Dewayne appeals the trial court's order, arguing three points on appeal: (1) the trial court erred in refusing to grant Dewayne a divorce upon the grounds of general indignities, (2) the trial court erred in denying Dewayne primary custody of his and appellee Michelle Witcher's son, and (3) the trial court erred in requiring Dewayne to pay child support when Dewayne and Michelle share an equal amount of parenting time. We affirm in part, reverse in part, and reverse and remand in part.

Dewayne and Michelle were married in May 2003 and separated in October 2004. During the brief marriage, Dewayne and Michelle went through four temporary separations. Their son,

Joseph, was born on May 20, 2004. Michelle also has custody of her older daughter, Ashley, from a previous marriage.

Michelle filed for divorce on the ground of general indignities, and Dewayne counterclaimed for divorce on the same ground. At the hearing, Michelle testified about an altercation that occurred at their home that prompted her to move out. Dewayne took Joseph to his mother's house because there was some noise in the house. Michelle walked over to Dewayne's mother's house and retrieved Joseph. Later, Dewayne's sister came over to the house and started hitting Michelle. Michelle called the police. Dewayne's sister was arrested. Michelle left the house, and that was the beginning of the last separation.

According to Michelle, she was the primary caretaker of Joseph when she was not at work, although Dewayne cared for him "once in awhile." Michelle stated that she did most of the cooking and cleaning in the home. Dewayne's mother took care of Joseph when Michelle was at work, although Michelle admitted that when she was not working, Joseph still stayed most of the time at Dewayne's mother's house. Michelle worked three days a week during the marriage but was unemployed at the hearing. Michelle testified that Dewayne wanted her to stay at home with the children, but she wanted to work. Michelle presently attends anger-management classes and sees a counselor for an anger management problem. She told one doctor that her anger outbursts consist of yelling, cursing, and punching holes in walls, and that the outbursts began after the birth of her daughter. According to Michelle, she used to lose her temper, but she only gets frustrated now and has learned to control her temper. She admitted that she has trouble getting along with co-workers, even though she denied this at the temporary hearing. She also admitted that she has had suicidal thoughts but would never harm herself.

According to Michelle, Dewayne has hit her twice. On one occasion, Dewayne hit her in the face and told her to be quiet. On another occasion, while she was pregnant with Joseph, he “hit [her] on the shoulder and knocked [her] down.”

Dewayne testified that he is self-employed doing excavation and dirt work. He stated that, since Joseph was born, he goes to work around 10:00 a.m. and stays until around 2:00 or 3:00 p.m. He stated that it was difficult to determine how much money he made in one month because his salary greatly fluctuated from month to month.

Dewayne denied that he ever slapped or hit Michelle. He did say that he “pushed her away and she fell.” He stated that he called her mother and apologized for that. He admitted that he preferred Michelle to stay home and not work. Dewayne also admitted that he was approximately \$700 behind in child-support payments for a daughter, Sara, from a previous relationship. Dewayne testified that Michelle is not a good mother because of her anger problem. According to Dewayne, he was the primary caretaker of Joseph when he and Michelle were married. He admitted that, on the days he had to work, Michelle would care for Joseph.

Dewayne testified that, when Michelle had an anger outburst, she would throw things, curse, and slam doors. She would have an outburst approximately every three days. According to Dewayne, Michelle sometimes scared Ashley. Dewayne stated that he blamed Michelle for most of the arguments during their marriage.

Dewayne admitted that he cannot read. He stated that he would hire tutors if necessary to help Joseph with his school work when the time came. He also stated that his family would be able to help Joseph with his school work. According to Dewayne, he would be able to spend “almost all of the day with [Joseph]” when he was not at work. When his son was in his custody, he cooked

for him and bathed him.

Dewayne's daughter, Sara, who was thirteen at the time of the hearing, testified that Dewayne would call her a couple of times a month and then he would disappear for a year or two. She stated that she did not want to get attached to Dewayne for fear of getting hurt but that she would like to have a normal relationship with him. Sara's mother, Beverly McCarver, testified that Dewayne had been invited to birthday parties in the past but never showed up. According to Beverly, Dewayne has seen Sara three times in the last couple of years.

Michelle's mother and Dewayne's mother testified at the hearing. There was testimony from a few witnesses who had each witnessed one of Michelle's anger outbursts. There was also testimony from Michelle's friends that she was a good mother.

After the hearing, the trial court denied a divorce to both parties, finding that "both parties are at equal fault for the break down of this marriage [f]rom [Michelle's] temper tantrums to Dewayne's laying on hands" The trial court continued the three-day visitation schedule that had been ordered at the temporary hearing. Michelle would have Joseph for three days and Dewayne would have Joseph for three days with the exchange taking place every fourth day. The trial court conditioned Michelle's custody period upon her seeking immediate help from a psychiatrist for her anger problem. Dewayne appeals the trial court's order. Michelle did not file a cross-appeal.

For his first point on appeal, Dewayne argues that the trial court erred in refusing to grant him a divorce upon the grounds of general indignities. The standard of review in this case is *de novo*. *Rocconi v. Rocconi*, 88 Ark. App. 175, ___ S.W.3d ___ (2004). On appeal, this court will not reverse the lower court's findings unless they are clearly erroneous. *Id.* A finding is clearly erroneous when, although there is enough evidence to support it, the reviewing court on the entire

evidence is left with a definite and firm conviction that a mistake has been made. *Id.* Because divorce is a creature of statute, it can only be granted upon proof of a statutory ground. *Id.* In this case, the action for divorce was based upon the grounds of general indignities. In order to obtain a divorce on that ground, the plaintiff must show a habitual, continuous, permanent, and plain manifestation of settled hate, alienation, and estrangement on the part of one spouse, sufficient to render the condition of the other intolerable. *Id.* General indignities have been defined as rudeness, unmerited reproach, contempt, and studied neglect. *Id.* The testimony of the plaintiff as to the ground for divorce is not sufficient; the plaintiff's testimony must be corroborated by other testimony. *Id.*

Here, the trial court, apparently relying on the doctrine of recrimination, found that both parties were equally at fault for the breakdown of the marriage. The doctrine of recrimination provides that, when the conduct of both parties has been such as to furnish grounds for divorce, neither of the parties is entitled to relief. *Rocconi, supra.* This doctrine only applies when both parties are equally at fault. *Id; Posey v. Posey*, 268 Ark. 894, 597 S.W.2d 834 (1980); *Weber v. Weber*, 256 Ark. 549, 508 S.W.2d 725 (1974). When one party's conduct is more egregious than the other party's conduct, it is proper to grant a divorce to the party whose conduct is the lesser of the two. *Rocconi, supra.* If it appears to the court that both parties have been guilty of the offense or injury complained of, then no divorce shall be granted or decreed. Ark. Code Ann. § 9-12-308 (Repl. 2002).

The trial court here did not find one party's conduct to be more egregious than the other's conduct. Both Dewayne and Michelle sought a divorce based on general indignities. There was testimony from several witnesses that Michelle had serious anger problems, which resulted in her

yelling, screaming, calling Dewayne obscene names, and breaking things. Further testimony from Dewayne, Michelle, and Michelle's mother revealed that Dewayne often criticized Michelle for her decision to work and either slapped or pushed Michelle, while she was pregnant, and she fell to the ground. Both parties admitted to fighting and fussing back and forth. The reviewing court in a divorce action gives due deference to the trial court's superior position to determine the credibility of witnesses and the weight to be given their testimony. *Weatherly v. Weatherly*, 87 Ark. App. 291, 190 S.W.3d 294 (2004). A review of the testimony in this case does not leave one with the firm conviction that a mistake has been committed. Thus, the trial court did not err in refusing to award Dewayne a divorce.

For his second point on appeal, Dewayne argues that the trial court erred in refusing to grant Dewayne primary custody of Joseph. The custody issue may be re-visited when the parties obtain a divorce. Even though a trial court denies a divorce, it may enter alimony, child custody, and child-support orders. *Rogers v. Rogers*, 80 Ark. App. 430, 97 S.W.3d 429 (2003) (citing *Horton v. Horton*, 75 Ark. 22, 86 S.W. 824 (1905)); see *Hadden v. Hadden*, 320 Ark. 480, 897 S.W.2d 568 (1995); *Narisi v. Narisi*, 229 Ark. 1059, 320 S.W.2d 757 (1959). Here, the trial court awarded neither Michelle nor Dewayne primary custody of Joseph. Instead, it ordered the parties to "share the physical custody of ... Joseph ... as they are currently such that [Michelle] shall have three (3) days with [Joseph] followed by [Dewayne] having three (3) days with [Joseph]. Said alternating visitation shall continue until further order of the Court."

In child-custody cases, we review the evidence *de novo*, but we do not reverse the findings of the trial court unless it is shown that they are clearly contrary to the preponderance of the evidence. *Tipton v. Aaron*, 87 Ark. App. 1, 185 S.W.3d 142 (2004). A finding is clearly against the

preponderance of the evidence, when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* In custody cases, the primary consideration is the welfare and best interests of the child, while other considerations are merely secondary. *Id.* This court gives special deference to the superior position of the trial court to evaluate and judge the credibility of the witnesses in child-custody cases. *Id.* Joint custody or equally divided custody of minor children is not favored in Arkansas. *Dansby v. Dansby*, 87 Ark. App. 156, 189 S.W.3d 473 (2004). Arkansas Code Annotated section 9-13-101(b)(1)(A)(ii) (Supp. 2005), however, was amended in 2003 to specifically permit the court to consider the award of joint custody. The mutual ability of the parties to cooperate in reaching shared decisions in matters affecting the child's welfare is a crucial factor bearing on the propriety of joint custody. *Dansby, supra.*

In this case, we are left with a definite and firm conviction that the trial court erred when it awarded joint custody to Dewayne and Michelle. There was testimony that Michelle had anger management problems that sometimes scared her daughter. While having an anger outburst, Michelle would sometimes scream, throw, and break things. Michelle told her counselor that she was “not really a kid person.” Further, Michelle told her counselor that she lost her job because she could not get along with a co-worker. Michelle also reported that she had had suicidal thoughts. There was testimony from at least two witnesses describing separate incidents of Michelle’s anger outbursts.

There was contradictory testimony regarding Joseph’s primary caregiver. Michelle worked three days per week, twelve hours a day, during the marriage. Dewayne worked almost every day, although his work hours varied. When both Michelle and Dewayne were working, Joseph stayed

with Dewayne's mother. Michelle testified that she was the primary caregiver for Joseph and that she did the laundry, cleaned house, and cooked. Dewayne refuted this and stated that Michelle did not have time to do most of the cooking and cleaning. Dewayne testified that he was the primary caregiver for Joseph and that he took care of Joseph and Ashley on the days that Michelle had to work.

Dewayne cannot read or write. He is educated through the tenth grade and does not have a GED. Dwayne testified that, when Joseph started school, Dwayne would get tutors to help his son with his homework when needed and that Dewayne's mother and sisters, who live nearby, would be able to help Joseph with school work. Dewayne's mother testified that Dewayne was a good father and "was very active in Joseph's life." Citing Michelle's anger management problem, the attorney *ad litem* recommended that custody be placed with Dewayne.

It is clear that Michelle's anger problem is affecting her ability to properly parent her children. Her own daughter is afraid of her because of her anger outbursts. Michelle cannot keep a job because of her anger problem. Michelle admitted that she is not a "kid person." When Michelle has an anger outburst, she screams, punches, throws, and breaks things, and she has acted this way in front of her children. Dewayne and Michelle have a history of arguing, and it is likely that they would not be able to cooperate in reaching decisions affecting Joseph's welfare. It is clear from the testimony that it would be in Joseph's best interests for primary custody to be awarded to Dewayne. When the evidence in the case has been fully developed and this court can determine the equities of the parties, as is the case here, this court decides the case without remanding it to the trial court. *See Bradford v. Bradford*, 34 Ark. App. 247, 808 S.W.2d 794 (1991); *Carter v. Carter*, 19 Ark. App. 242, 719 S.W.2d 704 (1986). Thus, we reverse the trial court's decision to award joint

custody of Joseph to Dewayne and Michelle, and we award primary custody of Joseph to Dewayne.

For his last point on appeal, Dewayne argues that the trial court erred in ordering him to pay child support even though he and Michelle shared an equal amount of parenting time with Joseph.

Because of our decision that Dewayne should have been awarded primary custody of Joseph, we must reverse and remand on this point so that the trial court can enter a decision regarding child support and visitation that is consistent with this opinion.

Affirmed in part; reversed in part; and reversed and remanded in part.

BIRD and BAKER, JJ., agree.